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THE RETAIL COMPETITION ENFORCEMENT ACT OF 1987

FEBRUARY 1, 1988.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 430, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 430) to amend the Sherman Antitrust Act, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

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I. PURPOSE

Vertical price fixing has been per se illegal for over 75 years. S. 430 codifies this rule.

II. HISTORY OF LEGISLATION

In 1911, the Supreme Court held that vetical price fixing is per se illegal. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220

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U.S. 373 (1911). While the Supreme Court has preserved entities' unilateral rights to deal with whomever they choose and currently judges nonprice vertical restraints under the rule of reason, the Supreme Court has never waivered from the view that vertical price fixing is per se illegal. *See. e.g., Continential T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 51 n.18 (1977); *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951); *United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707 (1944); *Straus* v. *Victor Talking Machine Co.,* 243 U.S. 490 (1917). Vertical price fixing violates the Sherman Act because it suppresses vigorous competition by independent entrepreneurs and adversely affects consumer welfare. Free enterprise presupposes the independence of competing business entities. This independence fosters creativity, hard work, and vigorous competition. Competition, in turn, promotes consumer welfare by encouraging lower prices, higher quality, and a greater variety of products and services.

In 1975, Congress expressly reiterated the unlawfulness of vertical price fixing through enactment of the Consumer Goods Pricing Act. 89 Stat. 801, amending 15 U.S.C. sections 1, 45(a). *See also Continential T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 51 n.18 (1977). This act repealed antitrust exemptions for the so-called "fair trade" laws. The "fair trade" laws allowed manufacturers to mandate a minimum or stipulated price at which a product could be resold. The outlawing of "fair trade" was a bipartisan effort, and was actively supported by the Department of Justice and by the Federal Trade Commission.

The Senate report accompanying the Consumer Goods Pricing Act took note of two studies conducted by the Justice Department. One, cited in a 1969 Economic Report of the President, indicated that consumers would save $1.2 billion a year by elimination of the "fair trade" laws. The other estimated that "fair trade" laws increased the price of fair-traded goods by 18 percent to 27 percent. S. Rpt. No. 466, 94th Cong., 1st Sess. 3 (1975). The Senate report concluded:

> Fair trade laws are in fact legalized price-fixing. They permit competing retailers to have identical prices and thus eliminate price competition between retailers. Id. at 3.

President Ronald Reagan, then a columnist for the Copley News Service, was among those who supported the elimination of the "fair trade" laws. In a column reprinted in the Congressional Record, Mr. Reagan condemned the fair trade laws as stifling competition, adding to inflation, and bereft of consumer benefits.[1]

Despite the current Justice Department's stated commitment to enforce existing legal precedent regarding vertical price fixing, it has not filed a single vertical price-fixing case. The only complaint alleging resale price maintenance filed by the Antitrust Division since 1981 was originated by President Carter's Assistant Attorney General. That case was subsequently dismissed with prejudice by William Baxter, President Reagans's appointee for head of the

[1] 121 Cong. Rec. 1268 (1975).

Antitrust Division. See letter from John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, to Senator Howard M. Metzenbaum (May 20, 1987) and letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, to Senator Howard M. Metzenbaum (May 26, 1987) (attached as Appendix A). By contrast, 36 State Attorneys General recently settled a resale price-fixing suit against the Minolta Corp., with a potential $4 million recovery for the citizens of their States. *See In Re Minolta Camera Products Antitrust Litigation,* 53 ATRR 56 (1987).

In addition, the current Department of Justice has intervened in court on behalf of defendants in several private vertical price-fixing cases. Most notably, in 1983, the Department filed an *amicus curiae* brief with the Supreme Court in *Monsanto Co.* v. *Spray-Rite Corp.* urging abandonment of the per se rule for vertical price fixing. The Supreme Court declined to address the Department's arguments:

> Certainly in this case we have no occasion to consider the merits of this argument. This case was tried on per se instructions to the jury. Neither party argued in the district court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal. In fact, neither party before this court presses the argument advanced by amici. We therefore decline to reach the question * * *. 465 U.S. 752, 761 n.7 (1984).

Prior to oral argument in *Monsanto,* Congress expressed its continued belief that vertical price fixing is per se illegal and directed the Justice Department not to seek to change the per se standard. The Department of Justice appropriations bill for fiscal year 1984 prohibited the expenditure of funds to overrule the per se rule against vertical price fixing:

> None of the sums authorized to be appropriated by this act may be used for any activity the purpose of which is to overturn or alter the per se prohibition of resale price maintenance, in effect under the federal antitrust laws, except that nothing in this section shall prohibit any employee of the Department of Justice from presenting testimony on this matter before appropriate committees of the House of Representatives and the Senate. Public Law 98–166, section 510.

The appropriations bill for fiscal 1985 deleted all reference to vertical restraints upon the Assistant Attorney General's assurance that the Department would respect current law and congressional intent concerning the per se rule. See the conference Report on H.R. 5712, Public Law 98–411.

After Congress lifted the appropriations ban, the Department of Justice promulgated its "Vertical Restraints Guidelines." Although these guidelines purported to deal only with nonprice restraints, they appear to narrow the per se approach to vertical price fixing. For example, the Department stated:

> [I]f a supplier adopts a bona fide distribution program embodying both nonprice and price restrictions, the Department will analyze the entire program under the rule

> of reason if the nonprice restraints are plausibly designed to create efficiencies and if the price restraint is merely ancillary to the nonprice restraints. Vertical Restraint Guidelines of the U.S. Department of Justice, Jan. 23, 1985 at 11.[2]

The guidelines led Congress once again to adopt appropriations restrictions. The fiscal year 1984 funding restriction was also included in both the fiscal year 1987 and 1988 Department of Justice appropriations bills. Public Law 99-1005, section 605 and Public Law 100-202, section 605. The fiscal year 1986 appropriations contained the fiscal year 1984 funding restriction as well as a bipartisan resolution expressing opposition to the Vertical Restraints Guidelines. This resolution declared that the Guidelines:

> (1) are not an accurate expression of the Federal antitrust laws or congressional intent concerning vertical price and nonprice restraints,
>
> (2) should not be treated by the courts as binding or persuasive, and
>
> (3) should be recalled. See S. Con. Res. 56 and H. Res. 303.

By codifying current law, S. 430 is intended to eliminate any confusion that has resulted from the Department's previous arguments about the per se illegality of vertical price fixing.

S. 430 also clarifies current law on an evidentiary issue that may arise during a vertical price-fixing case.

Since the Supreme Court's decision in *Monsanto Co.* v. *Spray-Rite Service Corp.,* 465 U.S. 752 (1984), there has been some confusion on the part of lower courts as to when the courts may grant defendants' summary motions, such as motions for summary judgment, for a directed verdict, or for judgment notwithstanding the verdict. Some courts, applying the ambiguous language in *Monsanto,* have inappropriately dismissed cases or imposed incorrect standards of proof in vertical price-fixing cases.

An essential element in a vertical price-fixing case is proof of an illegal agreement between entities on different levels of the distribution chain. S. 430 requires that the fact finder be permitted to consider certain evidence when deciding whether there was an illegal agreement between a seller and a reseller. This evidence relates to a seller's termination of or refusal to deal with a reseller, because of a suggestion, request, demand, or threat of a competing

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[2] In addition, the Guidelines suggest that vertical price fixing is not per se illegal as long as the price-fixing agreement does not set a "specific" resale price and is ancillary to a nonprice restraint:

> [I]f a supplier adopts a bona fide distribution program embodying nonprice restraints, these guidelinees will apply unless there is direct or circumstantial evidence (other than effects on price) establishing an explicit agreement as to the specific prices at which goods or services would be resold. Vertical Restraint Guidelines, supra, at 10.

A bipartisan Congressional Resolution declared that neither of these propositions accurately restates current law. Congress stated, among other things, that:

> Whereas such policy guidelines are inconsistent with established antitrust law, as reflected in Supreme Court decisions and statements of congressional intent * * * by blurring the distinction between price and nonprice restraints in analyzing a distribution program containing both types of restraints, thereby qualifying the accepted rule that vertical price fixing in any context is illegal per se; in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an "explicit agreement as to the specific prices * * *" Public Law 99-180, sec. 605.

reseller. S. 430 insures that relevant evidence is presented to the fact finder. It does not alter the requirement that the plaintiff prove a conspiracy or that the plaintiff bear the burden of proof.

III. Committee Action

S. 430 was introduced by Senators Metzenbaum, Rudman, Simon, and Bradley on February 2, 1987. A hearing on the bill was held on April 23, 1987. The committee, with a quorum present, approved a compromise amendment in the nature of a substitute cosponsored by Senators DeConcini, Grassley, Metzenbaum, and Leahy by voice vote on August 6, 1987.

IV. Discussion

S. 430 addresses two aspects of the law relating to vertical price fixing.

A

Section 8(a) of S. 430 addresses a type of vertical price-fixing case in which it is claimed that an entity has attepmted to eliminate or reduce a competitor's price competition by agreeing with a common supplier to terminate or refuse to supply the competitor. Since the Supreme Court decided *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), 3 years ago, there has been considerable confusion in the courts about the evidence that the terminated dealer in such a case must present to defeat summary motions and send its case to the trier of fact.

The *Monsanto* case did not change the elements of a vertical price-fixing conspiracy; it describes evidence which, if presented by a plaintiff, would be insufficient to avoid judgment as a matter of law. The court stated that "something more than evidence of complaints" by competitors about a terminated distributor's pricing was needed for the trier of fact to infer the existence of an illegal conspiracy. 465 U.S. at 764. The plaintiff prevailed in *Monsanto* because it had presented additional evidence that tended to show a conspiracy. Some of the language in the court's decision, however, could be intepreted to impose inappropriate burdens on a plaintiff in a vertical price-fixing case. For example, the *Monsanto* court said at one point in its opinion that a plaintiff dealer, which had been terminated following or "in response to" price-related complaints by competitor dealers, could not raise a triable issue unless it produced evidence that "tends to exclude the possibility" that the supplier had acted independently. 465 U.S. at 763, 764. This language has been misapplied to justify inappropriate summary dispositions against plaintiffs.

Some decisions have suggested, for example, that even if the termination was directly caused by the price-related complaints of a competing dealer, accompanied by economic duress, coercion and threats, the plaintiff could not get to the trier of fact unless it also offered independent proof of a resale-price arrangement between the supplier and the complaining dealer. These requirements are too severe, and S. 430, is intended to remedy these problems. The bill clarifies the *Monsanto* decision. S. 430 provides that if a plain-

tiff can produce sufficient evidence from which a trier of fact could reasonably conclude that a price-related communciation, as defined by the bill, was "a major contributing cause" of a distributor's termination, then the plaintiff is entitled to have the trier of fact consider whether the supplier and the complaining dealer engaged in a vertical price-fixing conspiracy. This is an important clarification of the post-*Monsanto* law.

While S. 430 addresses the inappropriate granting of summary motions against plaintiffs, it does not prevent a court from granting summary dispositions in favor of defendants in vertical price-fixing cases where the standards of the bill are not met.

S. 430 directs a court, when ruling on a summary motion, to determine whether there is sufficient evidence from which a trier of fact could reasonably conclude that (1) a distributor made an express or implied suggestion, request, demand, or threat to a supplier that the supplier take steps to curtail or eliminate price competition, and (2) that because of such suggestion, request, demand, or threat, the supplier terminated or refused to supply goods to a second distributor. If a trier of fact could reasonably so conclude, the summary motion should be denied. The trier of fact must then be able to make the determination, on the basis of all the evidence presented in the case, whether there has been an illegal vertical price-fixing conspiracy. S. 430 does not address every route a plaintiff may take in reaching the fact finder in a vertical price-fixing case. It deals with the route to the fact finder which could be inappropriately closed on the basis of some language in *Monsanto*.

The purpose of section 8(a) is to clarify when the fact finder shall be allowed to determine whether there has been a vertical price-fixing conspiracy. The court's determination as to whether a trier of fact could reasonably find the two predicate facts described in paragraphs (1) and (2) of the bill is to be made on the basis of all the record evidence—defendant's as well as plaintiff's—looking at such evidence in the light most favorable to the nonmoving party. The standards for evaluating the evidence in relation to subsection (a), prescribed by the Federal Rules of Civil Procedure, are not altered by the legislation.

Subsection (a) does not address or affect the substantive legal standards to be applied by the court and the trier of fact in deciding the merits of vertical price-fixing claims under sections 1 and 3 of the Sherman Act. S. 430 does not change the elements of conspiracy law. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946).[3]

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[3] Thus, the parties to the illegal agreement need not be motivated by the same interest. So, for example, a distributor may enter into an agreement motivated by the desire to eliminate or restrict price competition from a maverick competing distributor. The supplier, on the other hand, may go along with the agreement to pacify the distributor even though it might benefit from the maverick distributor's pricing policy. Coercing a party into an illegal agreement does not exonerate the coerced party from civil liability. On the other hand, the mere fact that a party has been coerced into an agreement does not in itself transform a lawful agreement into an unlawful one. *United States* v. *Paramount Pictures,* 334 U.S. 131, 161 (1948). *See also Simpson* v. *Union Oil Co., Supra,* 377 U.S. 13, 17 (1964) and *Eastern States Lumber Ass'n.* v. *United States,* 234 U.S. 600, 611-12 (1914).

B

Section 8(b) of the bill is designed to codify the per se prohibition against vertical price fixing. *Dr. Miles Medical Co.* v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911). The Supreme Court has consistently and properly held that vertical price fixing is per se illegal. *324 Liquor Corp.*, v. *Duffy*, 107 S.Ct. 720 (1987); *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752 (1984); *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982); *California Liquor Dealers* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *United States* v. *Parke-Davis & Co.*, 362 U.S. 20 (1960); *Kiefer-Stewart Co.* v. *Jos. E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United* v. *Line Material Co.*, 333 U.S. 287 (1948); *F.T.C.* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States* v. *Schrader's & Son*, 252 U.S. 85 (1920); and *United States* v. *Colgate Co.*, 250 U.S. 300 (1919). *See also Continental T.V. Inc.* v. *GTE Sylvania Co.*, 433 U.S. 36 (1977) (dictum). Section 8(b) is not, however, designed either to codify or change the specific applications of the per se rule; courts can continue to develop the law in this area within the constraints imposed by S. 430.

Section 8(b) has an important objective. There have been statements by officials in this administration that the per se prohibition against vertical price fixing is outmoded and should be modified. See discussion supra concerning the Vertical Restraints Guidelines. As a result of these statements, many business people may have become confused and may have been tempted to engage in conduct that is unlawful. S. 430 is intended to clear up any confusion once and for all. The per se standard is preserved.

The reason for the outright prohibition against price fixing has been variously stated by the Court over the years and is based on the purposes of the Sherman Act. The Sherman Act, in part, is meant to provide every business, no matter how small, with the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Thus, when collusion restricts price competition or robs a firm of the freedom to determine how much it will charge for its products or services, competition is restrained and consumers suffer. Section 8(b) restates plainly and unequivocally that all forms of vertical price fixing are illegal per se under the antitrust laws. In codifying this absolute prohibition, Congress makes clear that recent efforts by the administration to qualify, trivialize, or dilute the per se rule are disapproved as a matter of legislative policy.

Agreement on a price at a set level has never been a necessary element of a per se illegal price fix. S. 430 does not change this principle.

S. 430 codifies current law that under section 1 of the Sherman Act, vertical price-fixing agreements are per se unlawful. Accordingly, S. 430 does not apply to unilateral behavior—that is, conduct which is not the result of a contract, combination, or conspiracy—since unilateral behavior is not covered by section 1. It thus does not address the extent to which firms are permitted unilaterally to affect the pricing policies of resellers by refusing to sell to dealers who discount, nor does it address the extent to which firms, acting unilaterally, may be required to deal with others. *See United States*

v. *Colgate & Co.*, 250 U.S. 300 (1919). Similarly, S. 430 does not apply to non-price vertical restraints. *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), still governs the legality of non-price vertical restraints.

V. TEXT OF S. 430, AS REPORTED

[S. 430, 100th Cong., 2d sess.]

A BILL To amend the Sherman Act regarding retail competition

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Retail Competition Enforcement Act of 1987".

SEC. 2 The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

"Sec. 8. (a) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States, or by a state attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if there is sufficient evidence from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale—

"(1) received from a competitor of the claimant an express or implied suggestion, request, or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition by claimant in the resale of such good or service, and

"(2) because of such suggestion, request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to supply to the claimant some or all of such goods or services requested by the claimant,

then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section. A termination or refusal to supply is made "because of such suggestion, request, demand, or threat" only if such suggestion, request, demand or threat is a major contributing cause of such termination or refusal to supply.

"(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section.".

VI. Section-by-Section Analysis

SECTION 1

This bill, when enacted, may be cited as "The Retail Competition Enforcement Act of 1987."

SECTION 2

This section inserts a new section in the Sherman Act, 15 U.S.C. section 1 et seq, designating the new section as section 8, and renumbering the existing section 8 as section 9.

Section 8(a)

The new section 8(a) provides that certain evidence shall be sufficient to overcome a motion for summary judgment or directed verdict or judgment notwithstanding the verdict, and to subtain a jury finding of concerted action to set, change or maintain prices in certain kinds of civil actions under sections 1 and 3 of the Sherman Act. Section 8(a) preserves the role of the finder of fact, usually the jury, to determine credibility, weigh evidence, find facts, and determine whether the plaintiff's facts prove its case.

Specifically, if the plaintiff presents sufficient evidence from which a trier of fact could reasonable conclude that (1) the supplier of a good or service received from a competitor of a reseller an "express or implied suggestion, request, or demand" [4] that the supplier "take steps to curtail or eliminate price competition," and (2) the reseller was terminated by the supplier "because of" such communication, then the court must allow the issue of concerted action to be decided by the trier of fact. The court shall continue to apply the Federal Rules of Civil Procedure when implementing this bill. The bill does not change the rule that plaintiff's evidence may be either direct or circumstantial.

Section 8(a) applies in "any civil action based on section 1 or 3 of * * * [the Sherman] Act, including an action brought by the United States, or by a state attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act." Consequently, it applies to civil vertical price-fixing cases initiated by the Federal or State Governments as well as those initiated by private plaintiffs. The Justice Department may initiate such actions on behalf of the United States under section 4 of the Sherman Act and section 4A of the Clayton Act. State attorneys general may initiate such actions under sections 4, 4C, and 16 of the Clayton Act. And as noted in section 8(a), the Federal Trade Commission may initiate such actions under section 5 of the Federal Trade Commission Act. In cases brought by a Federal or State

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[4] The bill identifies a "threat to discontinue an existing business arrangement" as one example of a demand. As example of a "threat to discontinue an existing business arrangement" is a distributor's informing one of its suppliers that the supplier has a choice of either continuing to supply it with goods or services, or continuing to supply the distributor's competitor with goods or services. A "demand" to take steps to curtail or eliminate price competition in the resale of a good or service, of course, could be made in many other ways. The committee's substitute amendment refers specifically to a "threat to discontinue an existing business arrangement" because evidence presented to the committee indicates that such a threat is frequently made in response to a maverick competitor's pricing. Thus, the committee wanted to state explicitly that such a threat constitutes a "demand" to take steps to curtail or eliminate price competition in satisfaction of the requirement of paragraph 8(a)(1).

government, the committee intends that the word "claimant" in section 8(a) be understood to refer to any reseller of a good or service who could have maintained a private action against the defendants. While section 8(a) applies to actions by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, this section does not provide for a private right of action under the Federal Trade Commission Act.

Paragraph 8(a)(1)

An "express or implied suggestion, request or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition" includes all communications in which a competing dealer seeks a supplier's assistance in reducing price competition. As originally introduced, S. 430 used the term "communication regarding price competition" in subsection (a)(1). However, the DeConcini-Grassley-Metzenbaum-Leahy amendment rejects this formulation as too general a term to give the courts proper guidance. Instead, as amended, subsection (a) now requires that, in order to invoke the provisions of the legislation, a plaintiff must produce evidence that the defendant-supplier received from a competitor of a reseller "an express or implied suggestion, request, or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition" by the reseller in the resale of such good or service, and "because of such suggestion, request, demand, or threat terminated" the reseller as a buyer of such good or service for resale "or refused to supply" to the reseller "some or all of such goods or services requested" by the reseller. The plaintiff cannot invoke section 8(a) simply by showing a price-related communication or complaint without showing that it constitutes the necessary "express or implied suggestion, request, or demand * * * that the seller take steps to curtail or eliminate price competition" and without showing the necessary causation.

The phrase "steps to curtail or eliminate price competition" includes the termination of a reseller, refusal to supply a reseller, threats of such termination or refusal to supply, or attempts to induce a reseller to raise its price.

Paragraph 8(a)(2)

By its terms, section 8(a) requires that a plaintiff show more than that a termination or refusal to supply[5] simply followed in time a communication concerning price competition sent to his supplier by a competing dealer. The plaintiff must demonstrate that

[5] The phrase "refused to supply * * * some or all of such goods or services requested" presupposes that the supplier is currently providing the maverick seller with such goods or services. The goods or services subsequently denied "because of" its competitor's "suggestion," "request," "demand," or "threat" may either be the same goods or services, next season's goods or services, the next model of such goods, goods or services that contain a minor change from the original goods or services, or the like. For example, next season's clothes or next year's car model are covered by this phrase. The phrase does not include the supplier's refusal to supply a completely new line, such as a high-price line, which the supplier independently decides to market in a restricted fashion. The fact that this section does not cover a refusal to supply a completely new line is not meant to suggest that a vertical price-fixing conspiracy could not involve such a refusal to supply. The section also does not cover a refusal to supply that is based on an allocation scheme for goods in short supply, unless the scheme discriminates among dealers on the basis of their pricing policies.

termination or refusal to supply was "because of" the price communication. This requirement is not met unless a plaintiff shows that the price communication was a "major contributing cause" of the termination or refusal to supply. This language was added by the committee to ensure that de minimis or insignificant causation would not raise the inference under section 8(a).

In cases where there were multiple causes for a termination or refusal to supply—that is, price competition, inferior handling of the supplier's product, failure to abide by contractural obligations, lateness of paying bills—there was general agreement that a court need not find that the price communication was the sole, primary, or even at least 50 perent of the cause of the termination or refusal to supply.

There was also general agreement that major causation would not automatically be established simply because a communication about price competition was a link in a chain of events that led to termination or a refusal to supply. For example, a letter complaining about a dealer's pricing practices might trigger an investigation by the supplier that uncovers non-price-related grounds for a termination or refusal to supply. Where the weight of the evidence overwhelmingly shows that other deficiencies by the dealer led to the termination or refusal to supply, a trier of fact might not be able to conclude reasonably that "major contributing" causation existed.

Having made the showing provided by section 8(a), the plaintiff will be assured a trial (but not ultimate victory on the merits) if, viewed as a whole, the record could permit a legal conclusion at that procedural stage that the price communication was a major contributing cause of the termination or refusal to supply.

Vertical price fixing dealer termination and refusal to supply cases often involve questions of circumstantial evidence. The examples below list some of the types of circumstantial evidence that the plaintiff may introduce to support his claim of "major contributing cause" and some of the types of evidence that the defendants may introduce to refute the claim. The listing is only illustrative—there may be other types of evidence that either plaintiff or defendants may show. The presence or absence of one or more of these factors on either side will frequently not be dispositive (in many cases, one or more factors may be present on both sides). The overall record will be the basis on which the court will decide whether a trier of fact could find "major contributing cause."

Evidence that the supplier has only terminated dealers who have been the subject of such communications, for example, would tend to establish the necessary causal connection; on the other hand, evidence that the supplier has also retained dealers despite communications or unilaterally terminated discounting dealers would tend to refute the causal connection. Evidence that the asserted deficiencies of the terminated dealer in sales or services persisted for a long period of time before the communication would tend to establish the connection; evidence that the deficiencies became more serious after the communication would tend to refute it. Evidence that resale prices tended to be uniform in defendant-competitor's marketing area, but the plaintiff's prices were aberrational, would tend to establish the connection; evidence that resale prices varied

substantially in defendant-competitor's marketing area, and the plaintiff's prices were not aberrational, would tend to refute it.

Section 8(a) requires that if the plaintiff presents sufficient evidence from which a trier of fact could reasonably find the facts described in paragraphs (1) and (2), "then the court shall permit the trier of fact to consider" whether the defendants engaged in a vertical price-fixing conspiracy. This language precludes the granting of defendant's summary motions if the requirements of the bill are satisfied. The language does not create any evidentiary presumption.

Section 8(b)

This subsection codifies the longstanding rule that vertical price fixing is per se illegal.

The bill, as originally introduced, was amended in two ways by the DeConcini-Grassley-Metzenbaum-Leahy substitute to clarify that all forms of vertical price fixing are per se illegal. First, as originally introduced, S. 430 addressed "a contract, combination, or conspiracy to set, change, or maintain a price level." The phrase "price level," and similar terms, have almost become terms of art referring to a restrictive definition of vertical price fixing. The requirement of an agreement on a "price level" or on a specific price has never been the law. Such a requirement would make little sense, for example, when the vertical price-fixing conspiracy puts a distributor out of business because of its pricing practice.

The amendment in the nature of substitute deletes all references to a "price level" and substitutes the word "prices" instead. This change codifies existing law that a vertical price-fixing conspiracy need not include an agreement on a specific price or on a price level.

Second, the bill as originally introduced stated that "the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to established the resale price of such good or service shall be sufficient to establish that such seller and such purchaser engaged in concerted action to set, change, or maintain the price level of such good or service in violation of such section." The emphasized portions of this section of the bill might have been interpreted to mean a vertical price-fixing conspiracy must involve an agreement between a supplier and a reseller related to that reseller's pricing of a good or service.[6] This is certainly one of the traditional formulations of a vertical price-fixing conspiracy. It is not, however, an inclusive definition of vertical price fixing. Supra. The amended language makes it clear that all forms of vertical price fixing are illegal per se. The bill does not preclude the defendant from employing a currently available defense in a vertical price-fixing case.

VII. Estimated Cost of Legislation

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional

[6] Although the House of Representatives does not interpret its legislation in this manner.

Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 14, 1987.

Hon. JOSEPH R. BIDEN, Jr.
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 430, the Retail Competition Enforcement Act of 1987, as ordered reported by the Senate Committee on the Judiciary, August 6, 1987. CBO estimates that enactment of this bill would result in no cost to the federal government or to state local governments.

S. 430 would amend the Sherman Antitrust Act to codify the current per se rule against resale price maintenance, or vertical price fixing. The current per se rule is a judical presumption that certain types of agreements between sellers of goods or services and purchasers of those goods or services are anti-competitive, without the need to prove the economic consequences of those agreements. This bill would also clarify the evidence needed to permit a trier of fact to determine if there has been a violation of the Sherman Antitrust Act. For this purpose, a claimant need only prove that the seller of a good or service for resale received from a competitor an "express or implied suggestion, request, or demand," and that there was a resulting termination either in total or in part of the good or service requested by the claimant.

Based on information from the Department of Justice (DOJ), CBO estimates that enactment of this bill would result in no cost to the federal government. Neither the codification of the current per se rule against resale maintenance not the clarifiction of the evidence needed to permit a trier of fact to determine if there has been a violation is likely to significantly affect the scope or costs of DOJ's investigations and prosecutions.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the Act will not have any direct regulatory impact.

IX MINORITY VIEWS OF SENATORS THURMOND, HATCH, AND SIMPSON

S. 430, The Retail Competition Enforcement Act of 1987, reverses the Supreme Court's holding in *Monsanto* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and codifies the per se illegality standard for vertical price fixing. We are opposed to S. 430 because we do not believe the *Monsanto* decision should be reversed or that it needs clarification, because S. 430 is not necessary to protect discount operations in this country, and because if enacted, S. 430 will seriously undermine the Colgate doctrine and the law conspiracy. We also oppose S. 430 because we do not believe the per se standard for vertical price fixing should be codified and forever barred from judicial scrutiny.

At the outset, however, several points should be made about the committee report's characterization and criticism of the Department of Justice and its enforcement policy with respect to resale price maintenance. A total of six complaints in 10 years is hardly sufficient to be used for any measuring stick as to enforcement policy. As is evidenced by the letter from John R. Bolton responding to Senator Metzenbaum's May 20, 1987, request, the Justice Department, under both a Democratic administration and a Republican administration, has filed very few resale price maintenance cases in the 10 years from 1976 to 1986. The Justice Department has assured Congress that it will enforce the per se rule against resale price maintenance. However, the idea of inviting reconsideration of the per se rule by the courts is shared by many respected economists and legal scholars, and is based on many years of experience with antitrust laws and business behavior. Indeed, previous decisions of the Supreme Court, such as *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), invite rethinking of the per se standard for vertical price fixing. Just recently, in the *Business Electronics Corp.* v. *Sharp Electronics Corp.* litigation, the Supreme Court invited an amicus brief from the Department of Justice on the per se standard. As this committee will recall, the Department is restrained through appropriations restrictions from altering the per se prohibition on resale price maintenance, and thus was required to decline the Court's invitation.

The *Monsanto* decision is a little over 3 years old. In that decision, which was unanimous,[1] the Supreme Court held that a conspiracy to set vertical prices in violation of section 1 of the Sherman Act,[2] is not established by proof that a manufacturer terminated a distributor following, or even in response to, price complaints by other dealers. The Court held that, "[s]omething more

[1] Justice White did not participate in the Court's decision.

[2] Section 1 of the Sherman Act makes illegal "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce."

than evidence of complaints is needed. There must be evidence which tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." Id. at 764. The Court stressed that, "it is of considerable importance that independent action by the manufacturer, and concerted action on non-price restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages." Id. 763.

We do not agree with the committee report that language in the *Monsanto* decision is ambiguous, or that it has engendered considerable confusion concerning the application of the evidentiary standards in vertical price-fixing cases. In our view, the *Monsanto* decision clearly articulates the appropriate evidentiary standard applicable to dealer termination cases. If there is confusion among lower court decisions, or if the lower courts are applying incorrect standards, the more appropriate way to correct the situation is through the judicial process, and not through legislation like S. 430, which is itself ambiguous and confusing. Indeed, many of the controversial dealer termination cases—*Garment District, Inc.* v. *Belk Stores Services, Inc.*, 799 F.2d 905 (4th Cir. 1986); *McCabe's Furniture, Inc.* v. *La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986); and *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 780 F.2d 1212 (5th Cir. 1986)—have either been granted certiorari by the Supreme Court or have petitions pending. On January 19, 1988, the Court heard oral argument in the *Business Electronics* case, and a decision in that case should be reached shortly.

The committee report refers to unspecified cases which supposedly granted summary judgment despite evidence of "economic duress, coercion or threats." In fact, in most cases where there was such evidence, summary judgment was denied. See, e.g., *Arnold Pontiac-GMC, Inc.* v. *Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1987) (summary judgment denied where competing dealers agreed "not to purchase any of [Buick's] programs or cooperate with [Buick] in any of [its] endeavors" if additional dealer appointed); *Burlington Coat Factory Warehouse* v. *Belk Brothers Co.*, 621 F. Supp. 224 (S.D.N.Y. 1985) (summary judgment denied where complaining dealer threatened to stop buying unless manufacturer terminated discounter); *Jeanery, Inc.* v. *James Jeans, Inc.*, 1984-2 Trade Cas. (CCH) par. 66,278 (D. Ore. 1984) (summary judgment denied where manufacturer was pressured by a competing retailer to choose between losing the competitor's account or continuing sales to a discounter).

The case contrary to these authorities which the committee report apparently relies on is *Garment District, Inc.* v. *Belk Stores Services, Inc., supra.* That case is generally regarded by antitrust experts as an anomoly that will probably be corrected as the jurisprudence in this area progresses. See, e.g., the testimony of the Association of the Bar of the City of New York, Committee on Antitrust and Trade Regulation, before this committee on May 7, 1987. In fact, the Southern District of New York reached the opposite result on the exact same facts in *Burlington Coat Factory Warehouse* v. *Belk Brothers Co., supra.*

Some have argued that the evidentiary standard established by *Monsanto* is so difficult for a plaintiff to meet that it is virtually

impossible for a dealer termination case to reach the jury. Such an argument simply has no validity. In *Monsanto* itself, the Court found more than enough evidence to support the existence of price-fixing agreements and termination by the plaintiff, Spray-Rite, pursuant to the agreements.

Spray-Rite was an authorized distributor of Monsanto herbicides from 1957 to 1968. In 1968, after Monsanto declined to renew Spray-Rite's distributorship, Spray-Rite brought an action against Monsanto under section 1 of the Sherman Act claiming that it was terminated pursuant to a conspiracy between Monsanto and some of its distributors to fix the resale prices of Monsanto herbicides. The jury found for Spray-Rite and awarded $3.5 million in damages before trebling. On appeal, the court of appeals affirmed and stated that "proof of termination following competitor complaints is sufficient to support an inference of concerted action."

The Supreme Court reversed the holding of the court of appeals, but found that Spray-Rite presented enough evidence to prove that it had been the victim of an illegal price-fixing agreement. The Court found that there was direct evidence of resale price maintenance agreements from testimony by a Monsanto district manager that on at least two occasions after Spray-Rite was terminated, Monsanto advised price-cutting distributors that they would not receive adequate supplies if they did not maintain the suggested resale prices. After one of the distributors still did not comply, its parent company was informed of the situation and the parent instructed its subsidiary to conform to the resale price. There was also a distributor newsletter, which the Court described as a "more ambiguous example", which stated that "every effort will be made to maintain a minimum market price level."

The Court also found that there was ample evidence to support an inference that Spray-Rite had been terminated pursuant to the price-fixing agreements. In a meeting between Spray-Rite and Monsanto following the termination, one of the first things the Monsanto official referred to was the many complaints it had received concerning Spray-Rite's prices. In addition, there was evidence that Spray-Rite had never been informed of the alleged criteria which led to its termination, and that on several occasions from 1965–1966, Spray-Rite had been approached by Monsanto officials, informed of complaints from other distributors, and asked to maintain its prices. Finally, Spray-Rite testified that Monsanto made explicit threats to terminate if Spray-Rite did not raise its prices.

Proponents of the legislation argue that unless S. 430 is enacted, discount stores will be driven out of business and the consumer will be the ultimate loser. The facts indicate otherwise, however. The discount trade industry is flourishing, even after the *Monsanto* decision in 1984. In February 1987, according to Discount Store News, a discount store trade publication, there were some 57 publicly traded discount companies, including K-Mart, Wal-Mart, Federated Department Stores, and Burlington Coat. Burlington Coat, one of the strongest proponents of this legislation, and one of the most outspoken on the eventual demise of discount operations in light of *Monsanto*, has shown a steady increase in sales. According to a Value Line report of June 5, 1987, sales by Burlington Coat increased from $51.3 million in 1980, to $381.8 million in 1986. Sales

increased from $302.7 million in 1984, to a projected sales volume of $485 million for 1987.

Discounter Merchandiser, another trade publication, reported in its 1987 annual census, that the discount trade industry is continuing its growth trend. It reported that net store openings increased by 2.3 percent in 1986 over 1985, and that sales increased by 6.4 percent for the same time period. According to Discount Merchandiser, "[i]n terms of dollar volume, discount stores are the largest retailers of housewares and gifts, infants' wear, domestics, toys, small electrics, stationery and greeting cards. They are the second leading retailers of cameras and photo supplies, sporting goods and luggage, lawn and garden supplies, automotive accessories, and consumer electronics." With reference to specific stores, Discount Merchandiser noted that K-Mart's 5-year plan, announced in October 1986, anticipates 150 new K-Marts in this country; Wal-Mart achieved record sales for fiscal year ending January 31, 1987, of $11.8 billion; and Swallen's, Cincinnati's original discount store, finished fiscal year 1986–87 with a record $140 million in net sales.

In stark contrast to the fact that this legislation is not needed to protect discount operations, is the reality that S. 430 will wreak havoc with long established antitrust principles and will seriously undermine, if not effectively repeal, the long-standing *Colgate* doctrine and the law of conspiracy. In *United States* v. *Colgate & Co.,* 250 U.S. 300 (1919), the Supreme Court made clear that, "In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal." Id. at 307. In *Monsanto,* the Court underscored this point. In its effort to balance the right of a manufacturer to independently deal with whomever it wishes, and the right of a distributor to be free from illegal conspiracies, the Court stressed that, "There must be evidence which tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently." Id. at 764. Because S. 430 sanctions the use of ambiguous evidence to prove the existence of a conspiracy, the line between independent and concerted activity will be unavoidably blurred and independent, lawful activity, will inevitably be condemned.

Furthermore, S. 430 undermines a long list of antitrust and other cases dealing with conspiracy. In *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946), the Court defined a conspiracy as "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Id. at 810. The conspiracy can be proven either through an explicit agreement or an implicit understanding, but in any event it is necessary to prove that there was "a meeting of minds in an unlawful arrangement." S. 430 allows a jury to infer a conspiracy based on evidence which falls far short of the *American Tobacco* standard and seriously jeopardizes the traditional law of conspiracy. Even the causal connection between the price complaint and the termination which is required by S. 430, does not prove, without more, that there was any agreement between the manufacturer and the complaining distributor to adhere to resale prices.

In addition to reversing *Monsanto,* S. 430 codifies the per se rule against resale price maintenance. Although resale price maintenance is per se illegal under current law, codifying the per se rule is neither useful nor effective. In recent years, there has been increasing criticism of the per se rule against resale price maintenance as established in *Dr. Miles Medical Co.* v. *John D. Park & Sons,* 220 U.S. 373 (1911). It has been argued that resale price maintenance, in some circumstances, may promote interbrand competition. It may enable a manufacturer to create attractive and inviting stores and showrooms. It may enable dealers to train sales personnel to provide technical advice and assistance to customers regarding complex or new products. Resale price maintenance may also deter some dealers from taking a "free ride" on other dealers' sales efforts. Economists have identified other procompetitive reasons why a manufacturer might want to impose resale price maintenance. In view of this debate, it would be far wiser not to codify the per se illegality standard and to allow the courts full flexibility to hear and analyze all the relevant economic and legal issues.

The best example of the need for judicial flexibility is the history of non-price vertical restraints. In 1963, in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), the Supreme Court decided that non-price vertical restraints should be evaluated under the rule of reason. Only 4 years later, in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), the Court felt prepared to issue a per se rule prohibiting agreements between manufacturers and dealers limiting dealer's rights to sell outside certain territories or to unfranchised customers. There followed 10 years of confusion about the scope of the rule and debate over its wisdom. In 1977, in the *GTE-Sylvania* case, supra, the Supreme Court reconsidered the issue, overruling its prior per se decision and applying a rule of reason analysis to non-price vertical restraints. The Court concluded that a per se rule that did not rest on the competitive effects of the proscribed conduct would produce bad results in some cases. It said that any per se rule should be "based on demonstrable economic effect rather than * * * upon formalistic line drawing." This history clearly establishes that the courts must be able to interpret and modify per se antitrust rules if these rules are to continue to have rational and beneficial effects.

In this connection, it should be noted that S. 430 is also defective because it fails to recognize the distinction between minimum and maximum resale price maintenance. Nothing in the *Monsanto* decision addresses the setting of a ceiling on consumer prices, but S. 430, in its codification of the per se standard, would sweep maximum price agreements within its reach, as well as minimum price agreements. Maximum price fixing has been thought subject to a per se rule since *Albrecht* v. *The Herald Co.,* 390 U.S. 145 (1968), but that decision has been roundly criticized by the courts and leading academic authorities. *See Northwest Publishing* v. *Crumb,* 752 F.2d 473 (9th Cir. 1985); Areeda & Turner, *Antitrust Law,* par. 335.2, at 242 n. 47.

Under the arguments presented by the proponents of the bill, it is difficult to conceive how consumers could suffer any harm from creation of a maximum resale pricing policy. On the contrary, maximum price policies would prevent dealers from imposing inordi-

nate price markups in local resale markets, to the detriment of both consumers and the producer. Consumers, therefore, benefit from these lower prices, under the theories advanced both by opponents and supporters of S. 430.

The experience of the newspaper industry is particularly relevant here. Home delivery services, which usually operate as exclusive territorial distributors, can take advantage of their monopoly positions by charging high resale prices. People with limited mobility—the home-bound, the disabled, the elderly, and those in rural areas—are particularly subject to price gouging. In addition, since newspapers are generally sold in a limited number of outlets on a single copy basis, some retailers are in a position to charge enormous markups, perhaps even doubling the price of daily and Sunday papers. Newspapers derive their revenues partly from the price subscribers pay, but more importantly from rates paid by advertisers. Newspapers, therefore, may find it in their interest to keep prices paid by consumers lower in order to maintain circulation—a position consistent with first amendment values and democratic imperatives. But under S. 430, a publisher seeking to keep prices low would have no opportunity to urge reconsideration of *Albrecht,* and no opportunity to argue that its activities were procompetitive and proconsumer.

It was not by accident that the antitrust laws were framed broadly rather than containing a long and detailed laundry list of proscribed activities. The drafters of the Sherman Act intended to draft a general statute, to be amplified as necessary through judicial reasoning and by experience over time, including changing circumstances. Senator Sherman himself remarked that,

> It is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do, is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. 21 Cong. Rec. 2460 (1889).

Statutory rules phrased in terms of specific practices rather than in terms of competitive purpose or effect lack the flexibility needed for optimum antitrust enforcement. Sound antitrust rules are simply not amenable to fixed, detailed, articulation. Not every court decision is well conceived, and even some decisions that are correct when issued, appear later to be based on weak findings and logic. The common law process can correct for these. Legislation along the lines of S. 430 raises the specter of far more serious problems, which would be far more difficult to correct.

X. Changes in Existing Law

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 430, as reported, are shown as follow (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SHERMAN ANTITRUST ACT

AN ACT To protect trade against unlawful restraints and monopolies, Fifty-First Congress, approved July 2, 1890 (26 Sat. 209, as amended; 15 U.S.C. 1).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Sherman Act". (90 Stat. 1397; 15 U.S.C. 1, note)

Trusts, etc., in restraint of trade illegal; penalty (26 Stat. 209; 88 Stat. 1708; 89 Stat. 801; 15 U.S.C. 1).

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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Forfeiture of property in transit (26 Stat. 210; 15 U.S.C. 6).

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Suits by persons injured (26 Stat. 210; 69 Stat. 283; 15 U.S.C. 15 and note).

[Sec. 7. Repealed.]

SEC. 8. (a) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States, or by a State attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices, if there is sufficient evidence from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale—

(1) received from a competitor of the claimant an express or implied suggestion, request, or demand, including a threat to discontinue an existing business arrangement, that the seller take steps to curtail or eliminate price competition by claimant in the resale of such good or service, and

(2) because of such suggestion, request, demand, or threat terminated the claimant as buyer of such good or service for resale or refused to supply to the claimant some or all of such goods or services requested by the claimant, then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section. A termination or refusal to supply is made "because of such suggestion, request, demand, or

threat" only if such suggestion, demand or threat is a major contributing cause of such termination or refusal to supply.

(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or consipiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section.

"Person" or "persons" defined (26 Stat. 210; 15 U.S.C. 7).

SEC. [8.] *9.* That the word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.

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APPENDIX A

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, May 20, 1987.

Hon. HOWARD H. METZENBAUM,
U.S. Senate,
Washington, DC.

DEAR SENATOR METZENBAUM: Your letter of May 8, 1987, to Acting Assistant Attorney General Charles F. Rule of the Antitrust Division, containing certain requests for information, has been forwarded to this office for response.

The Department delivered to your staff a copy of its brief in *Business Electronics Corp.* v. *Sharp Electronics Corp.,* Sup. Ct. Docket No. 85-1910, on Thursday, May 14, the day the brief was filed. It is our understanding that this fulfills your first request. In addition, I understand that Mr. Rule's staff has forwarded to your staff an updated copy of the "Antitrust Division Workload Statistics" in fulfillment of your second request.

I enclose with this letter a tabulation of the vertical price-fixing investigations opened and cases filed by the Antitrust Division for the years 1976-1986, in fulfillment of the third request. I trust that this completes our compliance with your inquiry. Please let me know if we can be of any further assistance in connection with Mr. Rule's confirmation hearing.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

Enclosure.

RPM DATA

	Investigations opened	Cases filed
1976	4	1
1977	14	0
1978	4	1
1979	7	1
1980	10	1
1981	1	2
1982	1	0
1983	0	0
1984	0	0
1985	3	0
1986	2	0

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION,
Washington, DC, May 26, 1987.

Hon. HOWARD H. METZENBAUM,
U.S. Senate,
Washington, DC.

DEAR SENATOR METZENBAUM: This responds to your request for the names, filing dates and dispositions of the cases most recently filed by the Antitrust Division challenging resale price maintenance. These were: *United States* v. *Mack Trucks, Inc., et al.,* Civil No. 81-0102, filed January 12, 1981, and *United States* v. *Cuisinarts, Inc.,* Civil No. H80-559 and Criminal No. H-80-49, both filed September 17, 1980. We mistakenly advised you earlier that the civil *Cuisinarts* case was filed in 1981. In fact, the consent judgment in the civil *Cuisinarts* case was entered in 1981 after being filed December 19, 1980.

The cases were disposed of in the following manner. *United States* v. *Mack Trucks, Inc., et al.,* was dismissed with prejudice by the government on July 8, 1981. The defendant in the *Cuisinarts* criminal case pled nolo contendere and was fined $250,000. The civil *Cuisinarts* case was settled with a consent decree prohibiting Cuisinarts, Inc. from engaging in resale price maintenance or practices in support of resale price maintenance. The decree was entered on March 26, 1981.

I hope that this answers all of your questions.

Sincerely,

CHARLES F. RULE,
Acting Assistant Attorney General.

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